

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1 (Phase II)

UNITED STATES POSTAL SERVICE MOTION FOR CLARIFICATION ON REMAND
(December 12, 2011)

On January 14, 2010, the Commission issued Order No. 392 finding that certain activities related to the Postal Service's licensing of its brand in the commercial marketplace should be considered outside of the authority granted to the Postal Service under the Postal Accountability and Enhancement Act (PAEA). Specifically, that Order required the Postal Service "to terminate the nonpostal service of licensing the sale of USPS-branded mailing and shipping products at retail locations other than Postal Service facilities."¹

As a result of this Order, the Postal Service and LePage's 2000, Incorporated, filed Petitions for Review with the United States Court of Appeals for the District of Columbia Circuit seeking to reverse the Commission's required termination of such licenses.² The Court vacated the Commission's Order, and remanded the decision to the Commission for further proceedings consistent with the Court's opinion.³

¹ Order 392 at 27.

² *LePage's 2000, Inc. and LePage's Products, Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225 (D.C. Cir. 2011).

³ *Id.* at 234.

The Postal Service respectfully requests that the Commission take prompt action to clarify its position consistent with the Court of Appeals' ruling. Such action is necessary so that the Postal Service may know and understand the constraints, if any, the Commission may now seek to impose on the Postal Service's commercial licensing program for mailing and shipping products.

This program is currently in an untenable state of limbo. While the Court has vacated Order No. 392, the Commission's preliminary determination regarding these licenses in Order No. 154 remains intact.⁴ That Order established the Phase II proceedings to determine whether the existing mailing and shipping licenses could continue, and also forbade the Postal Service from entering into new mailing and shipping licenses pending the outcome of those proceedings.⁵ Therefore, until the Commission takes action on the remand, the Postal Service will not know whether the Postal Service can pursue new licensing opportunities.

If the Commission now believes, based on the Court's decision, that the program should continue, the continuation of the ban in Order No. 154 unnecessarily impairs the program's ability to fully and effectively license the Postal Service's intellectual property to new licensees. While the Postal Service does not believe this ban is consistent with the PAEA, the current regulatory environment precludes the Postal Service from negotiating future agreements, and could inhibit the Postal Service from negotiating beneficial amendments to existing agreements, even if such activities conform to the decision of the Court of Appeals. If, on the other hand, the Commission continues to

⁴ While Order No. 154 was upheld by the Court of Appeals in *U.S. Postal Service v. Postal Regulatory Comm'n*, 599 F.3d 705 (D.C. Cir. 2010), the Commission's determination regarding mailing and shipping licenses was "interim and interlocutory" in nature and thus not a "final" decision. See Order No. 171 at 2.

⁵ Order No. 154 at 76.

believe that, despite the Court's decision, the program should be terminated or restricted with respect to mailing and shipping products, its inaction on remand prevents the Postal Service and its current and potential licensees from understanding the rationale for that continued belief, and judicially testing it if necessary.

In order to provide certainty in Postal Service business decisions, fairness dictates a timely response by the Commission to the Court's remand. Indeed, a timely response by an agency "is implicit in every remand by [the C]ourt."⁶ The need for timely action here is particularly apparent because Congress clearly intended that the Commission expeditiously resolve the issue of which "nonpostal services" could continue following the enactment of the PAEA.⁷ Considering the two-year deadline imposed by Congress expired nearly three years ago, the Commission clearly is under a duty to promptly act on the Court's remand to conclude this docket. Expeditious action also is necessary because the Commission's inaction allows it to effectively continue its vacated decision banning mailing and shipping licenses (with the exception of the LePage's license), due to the fact that Order No. 154's ban on new licenses remains in effect. As such, continued inaction improperly subverts the Postal Service's right to a judicially reviewable decision justifying that ban.⁸

The Postal Service continues to believe that commercial licensing of mailing and shipping products is proper under the PAEA, and under the Commission's prior application of that Act in Phase I. But, the Commission's further action on the Court's

⁶ *In re Core Communications, Inc.*, 531 F.3d 849, 857 n.7 (D.C. Cir. 2008).

⁷ 39 U.S.C. § 404(e)(3) (imposing two-year deadline on issuance of final decision concerning "nonpostal services").

⁸ See *Cutler v. Hayes*, 818 F.2d 879, 897 & n.154 (D.C. Cir. 1987) (noting that "agency delay may collide with the right to judicial review," and citing *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970), for the principle that "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief.").

remand remains a necessary condition to achieve finality for the Postal Service regarding the status of the licensing program. Accordingly, the Postal Service requests that the Commission promptly issue further clarification based on the Court of Appeals' remand of June 7, 2011.

Respectfully submitted,

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